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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964.

No. 55

INDEPENDENT PETROLEUM WORKERS OF AMERICA, INC.,

Petitioner,

vs.

AMERICAN OIL COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT.

RICHARD P. TINKHAM,
DANIEL F. KELLY,
ALLEN W. TEAGLE,
708 Calumet Building,
Hammond, Indiana 46320,

DONALD L. HASTINGS,
910 South Michigan Avenue,
Chicago, Illinois 60680,

FREDERIC D. ANDERSON,
JERRY P. BELKNAP
JAMES E. HULLS,
1313 Merchants Bank Building,
Indianapolis, Indiana 46204,
Attorneys for Respondent.

TINKHAM, BECKMAN, KELLY AND SINGLETON,
Hammond, Indiana 46320,

BARNES, HICKAM, PANTZER & BOYD,
Indianapolis, Indiana 46204,
Of Counsel.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

INDEX.

	PAGE
Questions Presented	1
Statement of the Case	2
The Prior Litigation	5
The Proceedings in the Present Case	8
Summary of Argument	13
Argument	19
I. The Issue Is Whether the Company Promised to Arbitrate This Grievance	19
II. The Company Did Not Promise to Arbitrate This Grievance	23
III. The Prior Judgment Precludes Relitigation of the Issues Here Presented	33
1. The Happenstance That an Original Contract and Its Renewal Are Involved Does Not Affect Application of the Collateral Estoppel Doctrine	39
2. The Fact That the Union Here Relies on Another Subparagraph of the Contract and on a New Grievance Does Not Provide an Escape From the Collateral Estoppel Rule	43
3. The Intervention of the Steelworkers Trilogy Does Not Make the Collateral Estoppel Rule Inapplicable	47
Conclusion	51

TABLE OF CASES AND AUTHORITIES CITED.

Cases.

Atkinson v. Sinclair Refining Co. (1961), 370 U. S. 238 ..... 13, 19

Botany Mills v. Textile Workers Union (1958), 50 N. J. Super. 18, 141 A. 2d 107 42

Commissioner v. Sunnen (1948), 333 U. S. 591 ..... 36, 39, 48

Commissioner v. Texas-Empire Pipe Line Co. (10th Cir. 1949), 176 F. 2d 523 38

Dr. Salsbury's Laboratories v. I. D. Russell Co. (8th Cir. 1954), 212 F. 2d 414 48

Drake Bakeries v. Bakery Workers (1961), 370 U. S. 254 ..... 13, 19

Fishgold v. Sullivan Drydock & Repair Corp. (1946), 328 U. S. 275 46

Gardner v. Buckbee (N. Y. 1854), 3 Coy. 120 42

Hudson Transit Corp. v. Antonucci (1948), 137 N. J. L. 704, 61 A. 2d 180 44

Independent Petroleum Workers v. Standard Oil Co. (N. D. Ind. 1959), 44 LRRM 2676, aff'd (7th Cir. 1960), 275 F. 2d 706 ..... 5, 6, 43, 48

International Association of Machinists v. Cutler-Hammer, Inc. (1947), 271 App. Div. 917, 67 N. Y. S. 2d 317, aff'd 297 N. Y. 519, 74 N. E. 2d 464 20

John Wiley & Sons v. Livingston (1964), 376 U. S. 543 ..... 13, 20, 21

Kennedy v. Mendoza-Martinez (1963), 372 U. S. 144 51

N. L. R. B. v. Brown & Root (8th Cir. 1953), 203 F. 2d 139 ..... 45, 46

Parker v. Westover (9th Cir. 1955), 221 F. 2d 603.... 38

Partmar Corp. v. Paramount Corp. (1954), 347 U. S. 89 51

Price v. Sixth Dist. Agricultural Ass'n (1927), 201 Cal. 592, 258 Pac. 387.....39, 44

Smith v. Town of Ontario (C. C. N. Y. 1880), 4 Fed. 386 45

Tait v. Western Maryland Ry. (1933), 289 U. S. 620.. 37

Tillman v. National City Bank (2d Cir. 1941), 118 F. 2d 631, cert. den. 314 U. S. 650..... 41

Tioga R. R. Co. v. Bloss, and Corn. R. R. Co. (1874), 87 U. S. 137, 22 L. Ed. 331..... 46

Town of Beloit v. Morgan (1869), 74 U. S. 619, 19 L. Ed. 205 .....41, 45

United States v. Moser (1924), 266 U. S. 236..... 50

United States v. Stoner & Downer Co. (1927), 274 U. S. 225 36

United Steelworkers v. American Mfg. Co. (1960), 363 U. S. 564.....13, 14, 19, 20, 21, 22, 27, 31

United Steelworkers v. Warrior & Gulf Nav. Co. (1960), 363 U. S. 574.....13, 19, 21, 24, 27; 33, 42

Wolfson v. Rubin (Fla. 1951), 52 So. 2d 344.....40, 42

Zdanok v. Glidden Co. (2d Cir. 1964), 327 F. 2d 944, cert. den. 377 U. S. 934.....35, 45

Statutes.

National Labor Relations Act, Sec. 9(a), 61 Stat. 143, 29 U. S. C. § 159(a).....29, 30

Textbooks and Miscellaneous.

3 Corbin on Contracts (1960):
§ 535 ..... 34, 49
§ 554 48
2 Freeman on Judgments, 5th Ed. (1925):
§ 672 46
§ 677 44
§ 713 48
50 C. J. S., Judgments, § 712(c) 45
Griswold, "Res Judicata in Federal Tax Cases," 46 Yale L. Jour. 1320 (1937) 37
Paul and Zimet, "Res Judicata in Federal Taxation," Paul, Selected Studies in Federal Taxation (2d Series 1938), p. 104 38

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BRIEF FOR RESPONDENT

Respondent accepts Petitioner's statements of "Opinions Below," "Jurisdiction" and "Statute Involved."

Respondent is dissatisfied with Petitioner's statement of the questions presented for review and statement of the case and, therefore, restates them as follows:

QUESTIONS PRESENTED.

Under a collective bargaining agreement containing lengthy and specific provisions limiting the questions which may be referred to arbitration, including, as one of them, that the questions "shall be limited to questions directly

involving or arising from applications, interpretations or alleged violations of the terms of this agreement," and including, as another of them, the provision that "each party shall have the right to refuse to arbitrate" "matters relating to rates of pay, hours of employment, and other conditions of employment, which are not covered in this agreement," a union seeks arbitration of a claim that the employer, by contracting out certain work, violated the contract provision that "the company recognizes the union as the sole and exclusive bargaining agent with respect to rates of pay, wages, hours of employment, and other conditions of employment for all employees." The questions presented for review are:

1. Did the Court of Appeals exceed the limits of the judicial function or misinterpret the agreement, (a) by holding that the Company had not promised to submit that grievance to arbitration and (b) by rejecting the argument that the mere fact that a party claims a violation entitles it, under the terms of this particular agreement, to arbitration?

2. Where the same contract provisions have already been adjudicated in a prior case between the same parties and involving the same type of grievance, can the binding effect of that adjudication be avoided on the ground that (a) the provisions are embodied in a successor bargaining agreement which is a mere continuation of the earlier agreement, or (b) the losing party has developed a variant argument on which to make its contention, or (c) the losing party can point to an intervening decision of this Court on the general subject in a case which was pending on grant of certiorari at the time of the prior decision, but which the losing party did not regard as significant enough to justify the filing of a petition for certiorari in its own case at that time?

STATEMENT OF THE CASE

This is an action by the Union[1] to compel the Company[1] to arbitrate a grievance.

The grievance was filed October 25, 1960. (R. 19.) It was filed under an agreement executed August 10, 1960, to extend indefinitely a collective bargaining agreement executed August 27, 1959, the term of which otherwise would have expired August 14, 1960. (R. 26.)

Article II of that agreement (R. 9) established a "Grievance Procedure" covering all "questions upon which employees * * * desire consideration * * *." The first five sections of Article II provide for negotiations of the question between Union and Company representatives at ascending levels of authority. Section 9 provides that if the question is not settled as a result of negotiation either party may refer the subject for arbitration. (R. 10-11.)

Section 10 of Article II provides:

> "*Section 10.* As a specific limitation on the foregoing Section 9 of this Article II, the following shall be effective:
>
> "A. Questions which may be referred to arbitration shall be limited to:
>
> "1. Questions directly involving or arising from applications, interpretations or alleged violations of the terms of this agreement.
>
> "2. Questions directly involving or arising from applications, interpretations, or alleged violations of the terms of arbitration awards and written agreements not incorporated in this Agreement.
>
> "3. Questions of applications or interpretations of or alleged noncompliance with

1. The parties are herein referred to as the "Union" and the "Company" as in Petitioner's brief at page 3.

past policies, practices, customs or usages relative to working conditions, and grievances arising from:

"(a) the modification by the Company of any of said policies, practices, customs and usages, or

"(b) the discontinuance by the Company of any of said policies, practices, customs and usages, or

"(c) the establishment by the Company of new policies, practices, customs or usages during the term of this Agreement.

* * * * *

"D. The Company will bargain with the Union with respect to matters relating to rates of pay, hours of employment, and other conditions of employment, which are not covered in this Agreement, or in any side agreement or arbitration award, but each party shall have the right to refuse to arbitrate any such matter. In the event either party does so refuse, the no-strike clause contained in Section 2 of Article XIII of this Agreement shall be suspended but solely with respect to the issue concerning which either party shall have so refused to arbitrate." (R. 11-12.)

On October 17, 1960, the Company contracted-out certain crane-operating work. (R. 30.) On October 25, 1960, the Union filed a grievance alleging that the Company's action violated the recognition clause of the Agreement and past practice:

"The Board of Directors of the IPWA requests that, as required by the recognition clause of the applicable agreement and established past practice, policy, custom and usage, employees of the crane department be assigned and perform all crane operating work, as established by such past policy, practice,

> custom or usage, and that all employees who were displaced from such work or deprived of additional work in such classification by virtue of the use of employees of an independent contractor to perform such work, be compensated by the appropriate rate for all time and pay so lost." (R. 19.)

The parties negotiated with respect to the questions presented by the grievance at each step of the grievance procedure. The questions were not settled as a result of those negotiations and the Union requested arbitration on February 2, 1961. The Company refused on February 9, 1961. (R. 20.) The present action was instituted on June 2, 1961. (R. 1.)

The Prior Litigation.

There was prior litigation between the parties. Because of it the Court of Appeals applied the doctrine of collateral estoppel as an alternative ground for holding for the Company in the present case.[2]

In October 1957 the Company contracted out some work of repairing and refinishing stucco walls. The Union filed a grievance which read as follows:

> "The Board of Directors of the Independent Petroleum Workers of America requests that as required by the recognition clause of the applicable agreement and established past policy, practice, custom and usage, employees classified as Cement Finishers be assigned and perform all cement finishing work, as established by such past policy, practice, custom or usage, and that all employees who were displaced from such work or deprived of additional work in such classification by virtue of the use of employees of an independent contractor to perform such work be compensated by the

2. The facts concerning the prior litigation are set forth in the Opinion of the Court of Appeals in *Independent Petroleum Workers v. Standard Oil Company*, 275 F. 2d 706 (7th Cir. 1960), which is reprinted in Appendix C to the Petition for *Certiorari*.

appropriate rate for all time and pay so lost." (275 F. 2d 706 at 709; Appendix C to Petition for Certiorari, pages 38-39.)

Except for the different job title, the grievance is verbatim the same as that filed in the present case.

This was done under the collective bargaining agreement of March 8, 1957. (R. 29.) That was the agreement immediately preceding the agreement of August 27, 1959, which in turn was extended by the agreement of August 10, 1960, under which the present grievance was filed. (R. 26 and 29.)

That agreement, including the grievance and arbitration provisions and the limitations thereon, was the same as the one involved in the present case. (R. 49.)

In that prior case the grievance was processed; it was not settled; the Union sought to arbitrate; and the Company refused. The Union filed an action under § 301 to compel arbitration.

In that litigation the Union relied upon subparagraph (3) of § 10A of Article II of the agreement which provides that "Questions which may be referred to arbitration shall be limited to: * * * (3) questions of applications or interpretations of or alleged noncompliance with past policies, practices, customs or usages relative to working conditions * * *."

The District Court refused to order arbitration. *Independent Petroleum Workers* v. *Standard Oil Co.* (N.D. Ind. 1959), 44 LRRM 2676. The Court of Appeals for the Seventh Circuit affirmed. *Independent Petroleum Workers* v. *Standard Oil Co.*, 275 F. 2d 706 (repriated in Appendix C of the Petition for Certiorari.)

In reaching its conclusion, the Court of Appeals said:

"Since *Textile Workers Union of America* v. *Lincoln Mills*, 353 U. S. 448, 77 S. Ct. 912, 1 L. Ed. 2d 972, the

district courts are empowered under § 301 of the Labor-Management Relations Act, 29 U. S. C. A. § 185 to decree specific performance of an agreement to arbitrate a grievance dispute. *Brass and Copper Workers Federal Labor Union etc. v. American Brass Company*, 7 Cir., 272 F. 2d 849. But since arbitration is voluntary and consensual in nature, warrant therefor must be found within the terms and conditions of the bargaining agreement. *Local 1912, International Association of Machinists v. United States Potash Company*, 10 Cir., 270 F. 2d 496." (275 F. 2d 706 at 709.)

"The trial judge did not err in refusing to order the defendant to submit the grievances relating to the maintenance and repair work to arbitration. The defendant had not contracted to refer the issue to arbitration. It is only where such a contract has been made and the promise broken that the court will order arbitration. *Local No. 149 of American Federation of Technical Engineers (AFL) v. General Electric Company*, 1 Cir., 250 F. 2d 922, certiorari denied 356 U. S. 938, 78 S. Ct. 780, 2 L. Ed. 2d 813." (275 F. 2d 706 at 710.)

In reaching its conclusion, the Court of Appeals did not decide whether or not the grievance itself had merit. On the contrary, it concerned itself solely with interpretation of the arbitration provisions of the contract, to determine whether or not they contained a promise to arbitrate with respect to this subject matter. "The defendant had not contracted to refer the issue to arbitration. It is only when such a contract has been made and the promise broken that the court will order arbitration." (275 F. 2d 706 at 710.) It referred to the negotiating history and past practice solely to determine that question.

The Court of Appeals' decision issued on March 2, 1960. (R. 31.) This Court had already granted certiorari in the *American Manufacturing Co.* case on November 9, 1959

(361 U. S. 881) and in the *Warrior & Gulf Navigation Co.* case on December 7, 1959 (361 U. S. 912). Yet the Union made no effort to bring that case to this Court on certiorari.

The Proceedings in the Present Case.

The crane work involved in the present case was contracted out on October 17, 1960. (R. 30.) This was during the term of the agreement of August 10, 1960, by which the parties had extended the collective bargaining agreement of August 27, 1959.[3] The agreement of August 10, 1960, was negotiated after the Court of Appeals had adjudicated the meaning of the arbitration language in the prior litigation, and the Union had elected not to seek review of that adjudication in this Court.

The Union's grievance was, except for the job description, verbatim the same as its grievance in the prior litigation. (R. 19 and 275 F. 2d 706 at 709.) It was dated October 25, 1960.

The Union's complaint was filed June 2, 1961 (R. 1) and its amended complaint was filed October 5, 1962. (R. 4.) It was in two legal paragraphs. Legal Paragraph I (R. 4-6) claimed that the Union was entitled to arbitrate the contracting out grievance under Article II, § 10A(1) which provides:

> "As a specific limitation on the foregoing Section 3 of this Article II, the following shall be effective:
>
> "A. Questions which may be referred to arbitration shall be limited to:
>
> "1. Questions directly involving or arising from applications, interpretations or alleged violations of the terms of this agreement." (R. 11.)

3. Petitioner's statement, on page 3 of its brief, that the case arises under the agreement executed on August 27, 1959, is incorrect, since that agreement expired by its terms on August 24, 1960. (R. 26.)

Legal Paragraph II of the complaint (R. 6-7) contended that the grievance was arbitrable under Article II, § 10A(3) of the agreement which provides:

> "As a specific limitation on the foregoing, Section 9 of this Article II, the following shall be effective:
>
> "A. Questions which may be referred to arbitration shall be limited to:
>
> * * * * *
>
> "3. Questions of applications or interpretations of or alleged noncompliance with past policies, practices, customs or usages relative to working conditions, * * *." (R. 11-12.)

The Company, in its answer, in addition to denying the existence and violation of the obligations to arbitrate, as alleged in the complaint, and the existence of the alleged past practice, asserted, as a third defense, that the cause of action had been fully adjudicated in the prior litigation and that the Union had been granted a full and complete opportunity to present its claim against the Company in the former action. (R. 20-24.)

The Union moved for summary judgment solely with respect to Legal Paragraph I of its complaint. It never moved, or otherwise sought judgment in its favor, with respect to Legal Paragraph II. (R. 17.)

The Company moved for summary judgment on plaintiff's amended complaint in two paragraphs. (R. 24.)

The District Court denied defendant's motions for summary judgment as to paragraphs I and II of the amended complaint (R. 38), and granted the plaintiff's motion for summary judgment as to paragraph I of the amended complaint only. The District Court ordered paragraph II of the amended complaint dismissed. (R. 38.)

The Union never filed any appeal or cross-appeal from

the order of the District Court in dismissing Legal Paragraph II of the amended complaint. The Union did not urge in the Court of Appeals that it was entitled to arbitrate the grievance under Article II, § 10A(3), relating to past practices, which had been the subject matter of Legal Paragraph II of the amended complaint. It relied solely upon Article II, § 10A(1) relating to "alleged violations of the terms of this agreement," which was the subject matter of Legal Paragraph I of the amended complaint. The Court of Appeals said, in a footnote to its opinion:

> "The complaint contained two Legal Paragraphs but plaintiff in the District Court, as well as here, relies only upon Legal Paragraph I. It was upon this Paragraph that the District Court granted the relief sought." (R. 45.)

The opinion of the Court of Appeals, accordingly, does not deal with Legal Paragraph II.

On appeal, the Court of Appeals reversed the decision of the District Court and remanded the case to the District Court "with directions that plaintiff's motion for summary judgment be denied and defendant's motion allowed, in accordance with the opinion of this Court filed this day." (R. 53.)[4]

The Court of Appeals did not purport to deal with the merits of the alleged grievance.

> "Regardless of the approach, the question for decision remains as to whether the parties have obligated themselves by contract to submit the grievance in dispute to arbitration. Plaintiff recognizes this by its

4. Petitioner's statement, on page 8 of its brief, that the Court of Appeals remanded with directions that "the Company's motion on *both* claims be granted" (emphasis supplied) is mistaken. The judgment of the Court of Appeals does not so say. (R. 53.) Its opinion does not deal with Legal Paragraph II, except to say that it was not before it. (R. 44-45.) Legal Paragraph II has not been in this case since the District Court dismissed it (R. 38) and no appeal from that dismissal was taken.

> statement of the contested issue, as well as at other places in its brief. At one point it states, 'There is only the issue of the agreement— or non-agreement— of the parties to arbitrate.' At another point it asks, 'Did the parties agree to resolve by arbitration the violation of the agreement alleged by one of the parties?' " (R. 46.)

The Court, in examining and interpreting the particular promises with respect to arbitration, including the expressed limitations thereon in § 10A(1) and § 10D, found that they did not contain a promise by the Company to arbitrate every allegation by the Union that the Company had violated the contract. The Court said that this was the plaintiff's position as to the meaning of the arbitration limitations in this particular contract. It was as to this that the Court said: "Plaintiff's position is devoid of all logic. It is without merit and we so hold." (R. 48.)

The Court referred to the bargaining history relative to the right to contract out work, which it said "is much discussed in the briefs." (R. 48.) The Court held that it was not controlling, but that it fortified the conclusion which the Court had reached that there was no merit to the plaintiff's claim that the contract contained a promise to arbitrate every alleged violation.

The Court then turned to the question of collateral estoppel. It pointed out that the two cases involved the same parties with the same attorneys; collective bargaining agreements which were the same, including the provision for arbitration with the limitations thereon; contested issues which were the same, i.e., "whether the defendant agreed to arbitrate its right to contract out work"; and prayers for relief which were exactly the same. (R. 49-50.) The Court said: "* * * plaintiff in both cases has presented the same claim or demand, that is, that defendant be required to arbitrate the dispute in question. The only dif-

ference is that in the present case it offers in support of its claim a different reason from that relied upon in the previous case." (R. 50.)[5]

5. Petitioner's brief mistakenly asserts that the Court was "ignoring the fact that this was a new and separate grievance arising out of a new fact situation under a new collective bargaining agreement." (Brief for Petitioner, p. 9.) The Court of Appeals, in its opinion, reflects its awareness of the fact that the merits of the grievances might be different; but it did not feel that it was the Court's function to pass upon the merits of the grievances. It dealt rather with whether the identical language of promise and limitation with respect to arbitration, continued from the previous collective bargaining agreement, when applied to a grievance phrased in the identical terms, had a meaning different than that adjudicated between the same parties in the previous case.

SUMMARY OF ARGUMENT.

I.

The Court of Appeals followed faithfully the principles laid down by this Court in the *Steelworkers Trilogy* and the subsequent cases.[6]

The Court said: "• • • the question for decision remains as to whether the parties have obligated themselves by contract to submit the grievance in dispute to arbitration." (R. 46.) It decided only that issue. (R. 52.) It did not purport to decide the merits of the Union's claim.

Because the Court was construing an arbitration provision made up principally of "specific limitations" and exclusions which cover a page and a half of the record (R. 11-12) and because the meaning of the language of limitation and exclusion was in dispute, the Court applied the usual methods of contract interpretation to determine the scope and meaning of the promise.

II.

The contract provides in Article II, sections 1 through 5, a broad grievance procedure and, in Section 9, for arbitration.

Section 10 of Article II is a long and detailed one, and is phrased entirely in terms of limitation and exclusion. The parties thus expressed a paramount intention that

6. *United Steelworkers* v. *Warrior & Gulf Nav. Co.* (1960), 363 U. S. 574;
United Steelworkers v. *American Mfg. Co.* (1960), 363 U. S. 564;
Atkinson v. *Sinclair Refining Co.* (1961), 370 U. S. 238;
Drake Bakeries v. *Bakery Workers* (1961), 370 U. S. 254;
John Wiley & Sons v. *Livingston* (1964), 376 U. S. 543.

their promise to arbitrate be a limited one. The scope of the Court's inquiry was, therefore, broader than in cases where the promise to arbitrate contains no language of exclusion, or only vague or limited language.[7]

The Union in its amended complaint originally claimed the right to arbitrate under both Part A(1) relating to contract violations and under part A(3) relating to noncompliance with past practice. Legal Paragraph II of its amended complaint was dismissed by the District Court; no appeal was taken and the question was not urged or dealt with in the Court of Appeals. In the Court of Appeals, and here, the only claim of arbitrability in issue is that founded upon part A(1).

Therefore, the question before the Court was whether the Company had promised to arbitrate a claim that it violated Article I by contracting out some work. The Court properly found that it did not, by examining the promise to arbitrate and the limitations and exclusions from that promise, contained in the contract. That is the exact function of the Court as laid down by this Court in its decisions cited above. The Court of Appeals performed that function in the way which this Court has prescribed.

Part A(1) limits arbitration to questions *directly* arising from applications, interpretations, or alleged violations *of the terms of this agreement*. The Court, therefore, was required to determine, and did determine, whether there was a term of the agreement dealing with the subject of contracting out work. It did not seek to determine the merits of the grievance. That is, it did not seek to determine whether the agreement prohibited contracting out work, for to do so would be to deal with the merits. It determined only whether the subject of contracting out work was a "term of this agreement."

7. *United Steelworkers* v. *American Mfg. Co.* (1960), 363 U. S. 564 at 572.

Part D provides that "Each party shall have the right to refuse to arbitrate" "matters relating to rates of pay, hours of employment, and other conditions of employment, which are not covered in this agreement."

This is the other side of the same limitation which appears in Part A(1). The Court had to determine whether contracting out work was one of the matters "which are not covered in this agreement" because the parties had expressly agreed that if it was, "each party shall have the right to refuse to arbitrate any such matter."

Since the Union contended solely that the matter was covered in Article I, § 1, the Court had only to look there to see whether the subject of contracting out work was or was not covered.

Article I says the following, and only the following:

> "The Company recognizes the Union as the sole and exclusive collective bargaining agent with respect to rates of pay, wages, hours of employment, and other conditions of employment for all employees of the Company [in the appropriate bargaining unit]." (R. 8.)

Contracting out is not mentioned. It cannot be argued that somehow contracting out of work becomes a term of Article I, § 1, because it is somehow encompassed within the phrase "rates of pay, wages, hours of employment, and other conditions of employment." For part D of § 35 expressly says that there are "matters relating to rates of pay, hours of employment, and other conditions of employment, which are not covered in this agreement." As to those "each party shall have the right to refuse to arbitrate."

The Court looked at the bargaining history in an effort to determine whether contracting out work was one of the "matters * * * not covered by this agreement" or whether

it was one of the "terms of this agreement." It found that this history, "while of course not controlling fortifies the conclusion which we have reached that plaintiff's claim is without merit."

The contract at bar contains a limited no-strike clause. The Court of Appeals did not treat this as controlling. But in *American Manufacturing* and *Warrior & Gulf* this Court did treat the presence of a flat no-strike clause as an aid in interpreting the arbitration clause and finding it to be equally broad.

There had been prior litigation between the same parties. It related to a grievance identical in language except for a different job title. In it the Union claimed the right to arbitrate under identical contract provisions. The Court of Appeals determined that this contract language did not contain a promise by the Company to arbitrate the matter of contracting out work. Five months later, with that adjudicated meaning of this language before them, the parties entered into an agreement extending their contract with that same language. The meaning which the parties intended by the language to which they then agreed, could not have been different from the meaning which it had been adjudicated to have. The present grievance was filed under that contract.

Plainly the Company has not agreed to submit this dispute to arbitration. The Court of Appeals properly so held.

III.

The collateral estoppel rule is particularly applicable to an action such as this involving the interpretation of a contract as between the parties of the contract themselves and involving personal relations under the law of private contracts rather than governmental relations to its citizens under public law.

The collective bargaining agreement here involved is a renewal and continuation of the agreement involved in the prior case between these same parties. It carried over the same contract terms, including the identical arbitration provisions with the limitations thereon. The interpretation of the same contract provisions in the prior case is, therefore, binding in this case, especially since, after that adjudication, the Union not only did *not* seek any amendment of the agreement to conform to the interpretation it had urged, but it voluntarily agreed to extend the agreement with the same adjudicated provisions, and filed the present grievance during the period of the extension. This facet of the collateral estoppel rule has special force in collective bargaining agreements in view of the necessity of continuity of such contractual relationship and the concept of voluntary agreement as a basis of labor relations.

The issue of the arbitrability of a contracting-out grievance under the same contract provisions was determined in the prior case. An issue cannot be split into pieces; once determined, it is binding on the parties even though the loser may later conceive some grounds or reasons different from those it previously urged. The estoppel extends to every matter which was or might have been urged to sustain or defeat the determination made. The Union's current argument under Article II, Section 10(A)(1) is merely another reason in support of its position on the issue of arbitrability of the grievance and comes too late. Likewise, the fact that a different grievance is involved is immaterial. The contract has been construed and that construction is conclusive on other grievances of the same character and subject matter so long as the contract provisions remain the same.

The interpretation of a contract is essentially a question of fact, not of law, and, accordingly, the issue of contract interpretation in the prior case is the kind to which the

collateral estoppel rule applies with special force. While the Steelworkers Trilogy and other decisions of this Court have come down since the decision in the prior case, they mark no decisive change in the law, but are, rather, examples of the orderly development of legal principles in the way common to our jurisprudence. The collateral estoppel rule cannot be avoided on intervening events of this character. The argument that the prior decision is demonstrably bad because of a citation to a court of appeals' decision reversed in the Trilogy falls flat in view of the fact that all the Trilogy cases were pending in this Court on grant of certiorari at the time of the prior decision, but the Union did not regard that as sufficiently significant to warrant applying to this Court for a writ of certiorari. At the least, therefore, the case falls within the rule that where a question has been distinctly adjudged in one action, it cannot be disputed in a subsequent action even if the determination had been reached on an erroneous view or erroneous application of the law.

ARGUMENT.

I. THE ISSUE IS WHETHER THE COMPANY PROMISED TO ARBITRATE THIS GRIEVANCE.

There are only two issues in this case. The first is whether the Company promised to arbitrate the particular grievance. The second is whether the plaintiff's claim had been so litigated and determined in the prior case that it is not entitled to litigate it again. Parts I and II of the brief deal with the first question.

Where a union seeks an order compelling a company to arbitrate a grievance, this Court has stated plainly the function which the lower court is required to perform, and the limitations on that function.

This Court has said that there is no obligation to arbitrate unless the employer has promised to do so, and that the scope of the obligation does not exceed the scope of the promise. Therefore, this Court has said that it is the duty of the court to determine what promise was made.

This Court so said in *United Steelworkers* v. *Warrior & Gulf Nav. Co.* (1960), 363 U. S. 574:

> "The Congress, however, has by § 301 of the Labor Management Relations Act, assigned the courts the duty of determining whether the reluctant party has breached his promise to arbitrate. For arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." (363 U. S. 574 at 582.)

This Court said the same thing in *United Steelworkers* v. *American Mfg. Co.* (1960), 363 U. S. 564; *Atkinson* v. *Sinclair Refining Co.* (1961), 370 U. S. 238, 241; and *Drake Bakeries* v. *Bakery Workers* (1961), 370 U. S. 254, 256. This Court has restated the rule in clear and simple terms

as recently as March 1964 in *John Wiley & Sons* v. *Livingston* (1964), 376 U. S. 543, where it said:

> "'Under our decisions, whether or not the company was bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the Court on the basis of the contract entered into by the parties.' *Atkinson* v. *Sinclair Refining Co.*, 370 U. S. 238, 341. Accord, e.g., *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574, 582. The problem in those cases was whether an employer, concededly party to and bound by a contract which contained an arbitration provision, had agreed to arbitrate disputes of a particular kind. Here, the question is whether Wiley, which did not itself sign the collective bargaining agreement on which the Union's claim to arbitration depends, is bound at all by the agreement's arbitration provision. The reason requiring the courts to determine the issue is the same in both situations. The duty to arbitrate being of contractual origin, a compulsory submission to arbitration cannot precede judicial determination that the collective bargaining agreement does in fact create such a duty. Thus, just as an employer has no obligation to arbitrate issues which it has not agreed to arbitrate, so *a fortiori*, it cannot be compelled to arbitrate if an arbitration clause does not bind it at all."

This Court has also held that the courts must not decide the grievance, but only whether the company has agreed to arbitrate the grievance. Thus where the company had agreed to arbitrate a particular kind of question, the court must order it to arbitrate even if the court found the particular grievance to be "a frivolous, patently baseless one." *United Steelworkers* v. *American Mfg. Co.* (1960), 363 U. S. 564 at 566. The Court thus rejected the *Cutler-Hammer* doctrine which was then law in New York.[8] This

8. *International Association of Machinists* v. *Cutler-Hammer, Inc.* (1947), 271 App. Div. 917, 67 N. Y. S. 2d 317, affirmed 297 N. Y. 519, 74 N. E. 2d 464, disapproved in *United Steelworkers* v. *American Mfg. Co.* (1960), 363 U. S. 564 at 567.

Court reasoned that, where the parties had agreed to have the merits determined by the arbitrator, they were entitled to do so no matter how obvious and inevitable his answer would be.

This principle is limited only by the requirement that "the demands are not so plainly unreasonable that the subject matter of the dispute must be regarded as non-arbitrable because it can be seen in advance that no award to the Union could receive judicial sanction." *John Wiley & Sons v. Livingston* (1964), 376 U. S. 543 at 555.

This Court has also made it plain that, in deciding whether the Company has promised to arbitrate, the courts must look at the language of the contract taken as a whole, and interpret it by the same means by which contracts generally are interpreted. Thus in *United Steelworkers v. Warrior & Gulf Co.* (1960), 363 U. S. 574, the Court looked not merely at the promise to arbitrate, but at other language which was claimed to be an exception to it. The Court also looked at the scope of the no-strike clause. It interpreted the phrase "strictly a function of management," saying that it "must be interpreted as referring only to that over which the contract gives management complete control and unfettered discretion." (376 U. S. 574 at 584.) It treated the scope of the no-strike clause as an aid to determining the meaning of the parties as to the scope of the arbitration clause. (363 U. S. 574 at 583.)

In *United Steelworkers v. American Mfg. Co.* (1960), 363 U. S. 564, the Court, in determining whether the Company promised to arbitrate the particular grievance, found it relevant to examine the no-strike clause, the details of the grievance procedure, the management rights clause, and the seniority provisions. (363 U. S. 564 at 565-566.)

In his concurring opinion Mr. Justice Brennan pointed out that other promises contained in the agreement may be

relevant to the interpretation of the arbitration promise. And he said that the meaning of the arbitration promise is not to be found simply in the dictionary definitions of its words, but by reference to the background which gave rise to their inclusion:

> "And I emphasize this, for the arbitration promise is itself a contract. The parties are free to make that promise as broad or as narrow as they wish, for there is no compulsion in law requiring them to include any such promises in their agreement. The meaning of the arbitration promise is not to be found simply by reference to the dictionary definitions of the words the parties use, or by reference to the interpretation of commercial arbitration clauses. *Words in a collective bargaining agreement, rightly viewed by the Court to be the charter instrument of a system of industrial self-government, like words in a statute, are to be understood only by reference to the background which gave rise to their inclusion.* The Court therefore avoids the prescription of inflexible rules for the enforcement of arbitration promises. Guidance is given by identifying the various considerations which a court should take into account when construing a particular clause—considerations of the milieu in which the clause is negotiated and of the national labor policy." *United Steelworkers* v. *American Mfg. Co.* (1960), 363 U. S. 564 at 570. (Emphasis added.)

It is settled that where the arbitration promise excludes a particular area from arbitration, this broadens still further the scope of the Court's inquiry:

> "The issue in the *Warrior* case is essentially no different from that in *American*, that is, it is whether the company agreed to arbitrate a particular grievance. In contrast to *American*, however, the arbitration promise here excludes a particular area from arbitration: 'matters which are strictly a function of management.' *Because the arbitration promise is different, the scope of the court's inquiry may be broader.* Here, a court may be required to examine the substantive

> provisions of the contract to ascertain whether the parties have provided that contracting out shall be a 'function of management.'" Mr. Justice Brennan, concurring, *United Steelworkers* v. *American Mfg. Co.* (1960), 363 U. S. 564 at 571-572. (Emphasis added.)

The Court of Appeals here followed these principles faithfully. It stated only one issue. "Regardless of the approach, the question for decision remains as to whether the parties have obligated themselves by contract to submit the grievance in dispute to arbitration." (R. 46.) It decided only that issue. "Thus, we hold (1) that defendant was not obligated by the terms of the agreement to submit the grievance in dispute to arbitration." (R. 52.) It did not purport to decide the merits of the Union's claim. Because it was construing an arbitration provision filled with language of exclusion and limitation, the meaning of which was in dispute, it applied the usual methods of contract interpretation to determine the scope and meaning of the promise.

II. THE COMPANY DID NOT PROMISE TO ARBITRATE THIS GRIEVANCE.

The contract contains in Article II, in Sections 1 through 5, a procedure by which "questions upon which employees * * * desire consideration" may be the subject of "negotiations" at ascending levels of management and union authority. (R. 9-10.) The contract uniformly uses the term "question" rather than the term "grievance." It is not believed that that locution makes any difference.

Article II, § 9, provides that "If the question is not settled" at the manager level "the Company or the Union may refer the subject for arbitration." It provides how the arbitrator shall be selected and paid and makes his decision

9. Apart from the collateral estoppel question.

"final and binding on both the Company and the Union." (R. 10-11.)

Section 10 of Article II is a long and detailed one, and is phrased entirely in terms of limitation and exclusion. It begins: "As a specific limitation on the foregoing Section 9 of this Article II." Under it part A begins: "Questions which may be referred to arbitration shall be limited to." Part D describes certain matters and says explicitly "Each party shall have the right to refuse to arbitrate any such matter."

In *United Steelworkers* v. *Warrior & Gulf Nav. Co.* (1960), 363 U. S. 574, the exclusion only of "matters which are strictly a function of management" was enough to cause Mr. Justice Brennan to say:

> "In contrast to *American*, however, the arbitration promise here excludes a particular area from arbitration—'matters which are strictly a function of management.' Because the arbitration promise is different, the scope of the court's inquiry may be broader. Here, a court may be required to examine the substantive provisions of the contract to ascertain whether the parties have provided that contracting out shall be a 'function of management.'" (363 U. S. at 572.)

In the present case the contract language of limitation and exclusion occupies a page and a half of the printed transcript of the record. (R. 11-12.) The parties amply demonstrated their intention that their promise to arbitrate was a limited one, and that the limitations were the essence of the promise. If the "scope of the court's inquiry may be broader" because of the brief exclusion clause in *Warrior*, the Court cannot properly give less attention to the limitations upon the parties' promise in this case than the parties themselves did in their contract.

There are two layers of exclusions in the contract at bar. One layer appears in part A of § 10. The other layer

appears in part D. (R. 11-12.) Part A limits the questions which are arbitrable to three numbered kinds. Part D affirmatively gives each party "the right to refuse to arbitrate" certain described matters.

The Union originally sought to arbitrate questions which it claimed were within the limitations of part A(1) and part A(3) of § 10. The question under part A(1) involved a claim that by contracting out some work the Company had violated its recognition of the Union contained in Article I. (R. 9.) The question under part A(3) involved a claim that by contracting out some work the Company failed to comply with a policy, practice, custom or usage.

When the Company refused to arbitrate, the Union filed a complaint in two Legal Paragraphs. By Legal Paragraph I it sought to compel the Company to arbitrate the first question, which it claimed to be within the limitations of part A(1). By Legal Paragraph II it sought to compel the Company to arbitrate the second question which it claimed to be within the limitations of part A(3). (R. 4-7.)

The Union moved for summary judgment solely with respect to Legal Paragraph I. (R. 17.) It never sought judgment in its favor with respect to Legal Paragraph II. The District Court dismissed Legal Paragraph II. (R. 38.) The Union never sought to appeal from this order. It did not urge in the Court of Appeals the question covered by Legal Paragraph II, which in that paragraph it had claimed to be within the limitation of part A(3). It relied solely on the question which it claimed to be within the limitation of part A(1), and which it sought to compel the Company to arbitrate in Legal Paragraph I of its complaint. That is the only question the arbitrability of which is before this Court.[10]

Therefore, the question before the Court was whether

10. See the fuller description of the procedural background in the Statement of the Case, pages 8 to 10.

the Company had promised to arbitrate a claim that it violated Article I by contracting out some work.

The Court properly found that it did not, by examining the promise to arbitrate and the limitations and exclusions from that promise, contained in the contract.

There is both a limitation and an exclusion in the contract which exclude this particular area from arbitration.

The limitation is to be found in § 10A(1), the very part upon which the Union founds its claim.

> "Section 10. *As a specific limitation* on the foregoing Section 9 of this Article II, the following shall be effective:
>
> "A. Questions which may be referred to arbitration *shall be limited to:*
>
> "1. Questions *directly* involving or arising from applications, interpretations or alleged violations *of the terms* of this agreement." (R. 11). (Emphasis added.)

The specific exclusion is to be found in § 10D. It reads as follows:

> "Section 10. *As a specific limitation* on the foregoing Section 9 of this Article II, the following shall be effective:
>
> "D. The Company will bargain with the Union with respect to matters relating to rates of pay, hours of employment, and other conditions of employment, which are not covered in this Agreement, or in any side agreement or arbitration award, but *each party shall have the right to refuse to arbitrate any such matter.* In the event either party does so refuse, the no-strike clause contained in Section 2 of Article XIII of this Agreement shall be suspended but, solely with respect to the issue concerning *which either party shall have so refused to arbitrate.*" (R. 11-12) (Emphasis added.)

It is apparent that this is not a case with a broad arbitration provision such as that in *United Steelworkers* v. *American Mfg. Company* (1960), 363 U. S. 564, which contained no exclusion clause. It is not even a contract provision like the one in *United Steelworkers* v. *Warrior & Gulf Nav. Co.* (1960), 363 U. S. 574, which excluded only "matters which are strictly a function of management." It cannot be said here, as Mr. Justice Brennan said in *Warrior*, that "The very ambiguity of the *Warrior* exclusion clause suggests that the parties were generally more concerned with having an Arbitrator render decisions as to the meaning of the contract than they were in restricting the arbitrator's jurisdiction." (363 U. S. 564 at 572.) On the contrary, the fact that the parties put in a section which began "As a specific limitation on the foregoing," which contained four major parts and numerous subparts, and which takes up a page and a half in the transcript of the record, suggests that the parties were generally more concerned with putting limitations upon the arbitrator's jurisdiction than in binding themselves to arbitrate the various questions which under Sections 1 through 5 were subject to negotiation.

If the existence of the slight and ambiguous exclusion clause in *Warrior & Gulf* broadened the scope of the Court's inquiry, the lengthy and detailed limitations in the contract at bar demand that the Court take care not to require the Company to arbitrate something which it never agreed to submit to arbitration.

Part A(1) limits arbitration to questions *directly* arising from applications, interpretations, or alleged violations *of the terms of this agreement*. Since the charge for which arbitration is sought is that the contracting out of work violated a term of the agreement, the Court must determine whether there is a term of the agreement dealing with the subject of contracting out work.

This is not to say that the Court may determine whether or not the agreement prohibits contracting out work. To do so would be for the Court to determine the merits of the grievance. But the Court must determine whether the subject of contracting out work is a "term of this agreement," for the parties have agreed that "as a specific limitation" "questions which may be referred to arbitration shall be limited to" "questions directly involving or arising from * * * the terms of this agreement." If there is no "term of this agreement" relating to contracting out, then a question involving contracting out cannot be a question "directly" (as the parties carefully said) involving or arising from a term of the agreement.

It is to be noted that the adjective "alleged" modifies the noun "violations" and not the noun "terms." Whether or not there was a "violation" was something which could be "alleged" and could turn out to be fictitious. But to be within the "specific limitation" of the contract, the "terms" must be genuine.

It is for the Court to find whether there are "terms of this agreement" dealing with the subject of contracting out.

The Union purported to find the subject of contracting out to be dealt with in Article I, § 1, of the contract. The Court must therefore determine whether the subject of contracting out is one of the "terms" of Article I, § 1.

Part D is the other side of the coin. As Part A(1) said that arbitration was limited to questions directly involving the terms of the agreement, so part D says that "each party shall have the right to refuse to arbitrate" "matters relating to rates of pay, hours of employment, and other conditions of employment, which are not covered in this agreement." (R. 12.)[11]

11. Part D reads in full as follows: "The Company will bargain with the Union with respect to matters relating to rates of pay, hours of employment, and other conditions of employment, which are not covered in this Agreement, or in any side agreement

Putting the two parts together, the parties have said that if contracting out is one of the "matters" "which are not covered by this agreement," then "each party shall have the right to refuse to arbitrate any such matter." But if some limitation upon the Company's right to contract out work is one of the "terms of this agreement" then the Union is entitled to have a question directly arising from an alleged violation of those terms of the agreement submitted to arbitration.

It is apparent then, for the Court to determine whether the Company has promised to arbitrate a charge that it contracted out work, the Court must determine whether contracting out is one of the matters which are, or are not, "covered in this agreement."

That is what the Court of Appeals did. To have failed to do so would have violated the plain rules laid down by this Court in the Steelworkers Trilogy and succeeding cases.

The question is made easier by the fact that the Union, in Legal Paragraph I of its complaint has specified Article I, § 1, as the "term of the contract" which allegedly was violated. Article I, § 1, is entitled "Recognition." (R. 8.) It describes a group of employees who are represented by the Union, covered by the contract, and make up a "unit appropriate" for collective bargaining under § 9(a) of the National Labor Relations Act as amended.[12]

Article I, § 1, says the following, and only the following:

"The Company recognizes the Union as the sole and

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or arbitration award, but each party shall have the right to refuse to arbitrate any such matter. In the event either party does so refuse, the no-strike clause contained in Section 2 of Article XIII of this Agreement shall be suspended but solely with respect to the issue concerning which either party shall have so refused to arbitrate."

12. Ch. 120, Title I, § 101, 61 St. 143, 29 USC § 159(a).

exclusive collective bargaining agent with respect to rates of pay, wages, hours of employment, and other conditions of employment for all employees of the Company [in the appropriate bargaining unit]."[13]

Article I, § 1, then, is no more than a statement by the Company that it recognizes that the Union has the status which it was given by the statute.

As stated above, the Court was required to determine whether contracting work is one of the matters covered by Article I, § 1. Obviously it is not mentioned explicitly. The words do not appear. It cannot be argued that somehow contracting out of work becomes a term of Article I, § 1, because it is somehow encompassed within "rates of pay, wages, hours of employment, and other conditions of employment." For part D of § 10 expressly says that there are "matters relating to rates of pay, hours of employment, and other conditions of employment, which are not covered in this agreement." As to those (and it is submitted that contracting out is one) "each party shall have the right to refuse to arbitrate." But "the Company will bargain with the Union with respect to" those matters and as to them "the no-strike clause * * * shall be suspended." In Article I, § 1, the Company recognizes the Union as the collective bargaining agent for that purpose. As to them, the Company has promised to bargain. It has not promised to arbitrate.

There were also other reasons for finding that the Company had not promised to arbitrate the question which the Union raised.

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13. The parties had simply copied the language of § 9(a) of the National Labor Relations Act as amended: "Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment."

One of these is the bargaining history. The Court said that it was "not controlling" but that it "fortifies the conclusion which we have reached that plaintiff's claim is without merit." (R. 49.)

The record is plain that repeatedly, over a period of years, the Union proposed the inclusion in the collective bargaining agreement of provisions restricting the right of the Company to contract out work. Bargaining has taken place on those proposals, they were rejected by the Company, and they were not included in the collective bargaining agreement. (R. 28-30.) The Union's repeated efforts to have the subject of contracting out included in the agreement supports the conclusion that contracting out was one of the "matters relating to rates of pay, hours of employment, and other conditions of employment, which are not covered in this agreement," as to which "each party shall have the right to refuse to arbitrate." (R. 12.) The Court of Appeals would have been justified in treating this fact as controlling, and not merely as something which "fortifies the conclusion which we have reached that plaintiff's claim is without merit." (R. 49.)

Another fact is the no-strike clause.

In *American Manufacturing* and *Warrior & Gulf*, this Court did treat the presence of a flat no-strike clause as an aid in interpreting the arbitration clause and finding it to be equally broad. "There is no exception in the 'no-strike' clause and none therefore should be read into the grievance clause, since one is the quid pro quo for the other." (*United Steelworkers* v. *American Mfg. Co.*, 363 U. S. 564 at 567.) By the same token, and in the same degree, the express exception to the no-strike clause contained in part D of § 10 (R. 13) is an aid to interpreting the arbitration provisions of the contract at bar. As a no-strike clause without exceptions suggests an arbitration clause without

exceptions, so a limited no-strike clause suggests a limited arbitration clause.

A significant, indeed a compelling, aid in determining the scope of the Company's promise to arbitrate, is to be found in the relationship of the contract at bar to the prior litigation.

The prior litigation has been described in detail on pages 5 to 8 of this brief. It is there shown that the identical parties litigated whether the Company had promised by the provisions of an identical Article II, § 10, to arbitrate an identical grievance. The Court construed the contract language. It said that "The contested issue involved in both appeals is whether the respective grievance or dispute is one with respect to which the parties in their collective bargaining agreement have agreed to arbitration." (275 F. 2d 706 at 707.) The Court said: "The defendant had not contracted to refer the issue to arbitration. It is only where such a contract has been made and a promise broken that the court will order arbitration." (275 F. 2d 706 at 710.)

Thus on March 2, 1960 the Court of Appeals adjudicated, between the Company and the Union, that this contract language did not constitute a promise by the Company to arbitrate a claim that it contracted out work. Neither rehearing nor certiorari was sought. No change in the contract language was sought, but, on the contrary, five months later, on August 10, 1960, the parties executed an agreement containing that same language. It was thereafter, on October 17, 1960, that the contracting out took place, and on October 25, 1960 that the grievance was filed, both within the term of the agreement of August 10, 1960.

Can it be doubted that when the parties executed a contract with an adjudicated meaning, that was what they both understood to be the meaning of the contract they

signed? Is it not clear, under these circumstances, that the Company never promised, and never intended to promise, to arbitrate the contracting out of work? Is it not equally clear that under these circumstances the Union did not get, and did not expect to get, the promise of the Company to arbitrate the contracting out of work?

"For arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *United Steelworkers* v. *Warrior & Gulf Nav. Co.* (1960), 363 U. S. 574 at 582.

Plainly here the Company has not agreed to submit this dispute to arbitration.

The Court of Appeals properly so held.

III. THE PRIOR JUDGMENT PRECLUDES RELITIGATION OF THE ISSUES HERE PRESENTED.

This case presents a classic situation for application of the collateral estoppel doctrine. The issue presented is the interpretation and construction of the arbitration provisions of a collective bargaining agreement. The identical arbitration provisions have been continued without change in the successive collective bargaining agreements between the parties for several years. Under these provisions, a controversy between the parties arose as to the arbitrability of the same type of grievance several years ago, and the Union instituted litigation to obtain an authoritative construction and interpretation of those provisions, it contending, as it does here, that such a grievance is required to be arbitrated by the terms of the arbitration provisions.

While that litigation was pending, the same parties entered into a successor bargaining agreement and carried over into it the same contract terms, including the identical

arbitration provisions. The prior case went up to the Court of Appeals which adjudged that the contracting-out grievance is not within the arbitration provisions of the agreement.

After that decision, the Union made no effort to bring the case to this Court, even though the two decisions now principally relied upon had been pending in this Court on grant of certiorari for three months.[14] Instead, the Union not only accepted the Court of Appeals' decision interpreting the arbitration provisions, and made no attempt to get those provisions amended to conform to its claimed interpretation, but it voluntarily agreed to extend that agreement with the same arbitration provisions indefinitely. During the period of this extension, the grievance now relied upon arose. It is a grievance of the same kind and subject matter as that adjudicated in the prior case.

It is against this background that the Union seeks an encore of the litigation.

The collateral estoppel doctrine is a long established doctrine founded on sound and important policy considerations. It is a doctrine which is especially applicable to the type of case here presented—a controversy between the parties to a contract as to the interpretation of the contract as between the parties. As pointed out in 3 Corbin on Contracts, § 535 (1960):

> "There is no single rule of interpretation of language, and there are no rules of interpretation taken all together, that will infallibly lead to the one correct understanding and meaning. In understanding the variable expressions of others, men must do the best they can and results must be determined even though

[14] The Court of Appeals' decision in the prior case was issued on March 2, 1960. (R. 31.) This Court granted certiorari in the *American Manufacturing Co.* case on November 9, 1959 (361 U. S. 881) and in the *Warrior & Gulf Navigation Co.* case on December 7, 1959 (361 U. S. 912).

the understanding may be faulty. There is in fact no 'one correct' meaning of an expression; and the party choosing the expression may have no clear and conscious meaning of his own. In reading each other's words, men certainly see through a glass darkly; and yet it is necessary for men to act upon their understanding, and it is necessary to hold men responsible for inducing others thus to act.

"* * * If, after a careful consideration of the words of the words of a contract, *in the light of all the relevant circumstances*, and of all the tentative rules of interpretation based upon the experience of courts and linguists, a plain and definite meaning is achieved by the court, *a meaning actually given by one party as the other party had reason to know*, it will not disregard this plain and definite meaning and substitute another that is less convincing. Such a statement may be a mere truism; but it is not likely to lead to cocksure erroneous judgments." (Pages 15-16, 19-21.) (Emphasis added).

Plainly, as between the parties to a contract, once the interpretation of the contract has been adjudicated, that interpretation should be accepted, for if it does not accord with the intention of the parties, they can always make an appropriate amendment of it. And especially is this so in collective bargaining agreements which are of relatively short duration and subject to periodic reopening.

Indeed, the same considerations are involved in the companion "law of the case" doctrine, as shown by *Zdanok* v. *Glidden Co.* (2d Cir. 1964), 327 F. 2d 944, cert. den. 377 U. S. 934. In that case, the court adhered to a prior decision construing the same contract, even though new parties were present in the later case and even though the prior decision had been bitterly criticized and concededly raised doubt whether the court would construe other similar contracts in the same way. The court pointed out there:

"* * * Since the doctrine of the law of the case is ad-

dressed to the court's 'good use,' we see no reason why it should be peremptorily excluded because of the presence of new parties when the party against whom it is invoked was fully heard on a prior appeal, any more than that it must be rigidly applied whenever the parties remain the same. *The construction of a contract has long been recognized as the* type of issue '*that is particularly vulnerable to law of the case.*' Note, Law of the Case, 5 Stanford L. Rev. 751, 759 (1953), citing *Leese v. Clark*, 20 Cal. 387, 418 (1862)." * *

"This brings us to Glidden's argument that because of the additional evidence, which, it urges, was surely received with propriety in the Alexander action, the latter was not the same 'case' as that on which we previously ruled.

"* * * Still, with the issue of construction of the contract such a close one, we cannot be sure that the evidence now offered by Glidden and the inference from plaintiffs' failure to rebut it might not have tipped the scales on the prior appeal or be decisive in this one if properly before us. *But we hold that in the Alexander action also the new evidence should not be considered.*

"The reason for this lies in the principle *somewhat undescriptively called 'collateral estoppel'*; we hold that the ruling of liability in the *Zdanok* case precluded Glidden from offering new evidence to contest this not only against the five original plaintiffs but against the Alexander group as well." (327 F. 2d 953, 954.) (Emphasis added.)

The Union's argument that the collateral estoppel doctrine should not apply here rests on three propositions gleaned from this Court's decision in *Commissioner v. Sunnen* (1948), 333 U. S. 591. *Sunnen*, of course, was a federal income tax case and, concededly, the scope of the collateral estoppel doctrine in any case involving a question of public law as between the Government and a citizen is much more restricted than in a case involving a matter of private rights as between the parties. *U. S. v. Stoner &*

Downer Co. (1927), 274 U. S. 225, expressly recognizes this point in cases involving classification of duties under the Tariff Act. In there holding a plea of res judicata unavailing in such cases, this Court pointed out:

> "* * * These are the reasons, too, why the principle laid down by this Court in the decision already referred to, in *New Orleans* v. *Citizens' Bank*, 167 U. S. 371, should not apply or control. There, the thing adjudged was the existence of an immunity of the property of a bank from taxation, *due to a contractual obligation* of the state or city government to the bank,—*a personal relation which might without embarrassment and with much more safety be permanently fixed* for one tax payer than a question of fact or law affecting discriminatingly one of a whole class of importers and giving the exceptional operation in its favor of a general tariff on articles of merchandise largely imported." (274 U. S. 237.) (Emphasis added).

The same policy considerations, of course, are fully applicable in federal tax cases involving not personal relations but general public law application where a broad collateral estoppel rule could produce discrimination and inequity among taxpayers.

While collateral estoppel has been applied in tax cases, after the decision in *Tait* v. *Western Maryland Ry.* (1933), 289 U. S. 620, it began to be considered that the rule must be restricted. Thus, in *Griswold*, "Res Judicata in Federal Tax Cases," 46 Yale L. Jour. 1320 (1937), Dean Griswold urged that the doctrine should be rigidly limited in tax cases, saying:

> "Where different taxable years are involved in the two cases, res judicata should be applied much more narrowly than has been true in some cases in the past. Not only should it be confined to issues which are identical in the two cases, *but the word 'identical' should be rigidly construed to apply only to situations where the applicable statute is unchanged and all of*

the controlling facts occurred before the earlier of the tax years. Examples of such issues are the determination of March 1, 1913 value, the construction of a will or other instrument, and other situations in which the question may properly be thought of as static. An issue should not be regarded as 'identical' if it is merely similar, as where the question is whether an organization was a trust or association in successive tax years or was a personal holding corporation, or where the issue concerns different transactions or the construction or legal effect of different instruments, however similar the transactions or instruments may be. The ordinary rule of *stare decisis* is sufficiently rigid to provide for these situations; the extension of res judicata to them leads only to continued litigation as to its application.[194]

"194. This paragraph is entirely consistent with the Supreme Court's decision in *Tait* v. *Western Maryland Ry.*, 289 U. S. 620 (1933). The Court there referred to the rule as applying to the 'identical question' [*id.* at 624]; and the question there raised was of the sort here suggested as 'identical.' It is not necessary to modify or qualify any Supreme Court decision; *it is necessary only to fix the scope of the res judicata rule a little more narrowly, perhaps, than in non-tax cases, because of the inherent recurring nature of tax liability.*" (46 Yale L. Jour. 1357.) (Emphasis added).

Randolph Paul made an equally strong and similar plea in Paul and Zimet, "Res Judicata in Federal Taxation," *Paul, Selected Studies in Federal Taxation* (2d Series 1938), 104 at 140-148. This Court adopted this position in *Sunnen*, even to citing and relying on these same articles. (333 U. S. at 601-602.) Since *Sunnen*, it has been recognized that the collateral estoppel doctrine is applied more strictly in tax cases than in others. *Parker* v. *Westover* (9th Cir. 1955), 221 F. 2d 603, 605; *Commissioner* v. *Texas-Empire Pipe Line Co.* (10th Cir. 1949), 176 F. 2d 523, 525. The

limitations it places on the doctrine for income tax purposes, therefore, are not necessarily controlling in the present case which involves only a contractual obligation as between the parties and may without embarrassment and with much more safety be permanently fixed.

With these preliminary considerations covered, the Union's actual contentions against application of the collateral estoppel doctrine here may be separately considered.

1. The Happenstance That an Original Contract and Its Renewal Are Involved Does Not Affect Application of the Collateral Estoppel Doctrine.

The Union strenuously urges that the collateral estoppel rule cannot apply here because two separate agreements were involved, even though the language of the two is identical. *Sunnen* states such a rule "For income tax purposes" (333 U. S. 602), but the rule is plainly otherwise where the litigation involved is between the contracting parties and covers matters of private contract law rather than the application to private contracts of public law by the Government. *Price* v. *Sixth Dist. Agricultural Ass'n* (1927), 201 Cal. 502, 258 Pac. 387, is a specific application. There, prior litigation involved a lease from a city to the association. After that litigation the lease agreement was redrafted and a new instrument was executed to replace it. The changes were relatively minor, however. In holding the prior decision was conclusive of the current action, the court said in part:

> "* * * Appellants, admitting the general rule, however, seek to avoid the effect thereof by asserting that the causes of action are not the same; that the contract of June 21, 1920, made the subject of judgment by the District Court of Appeal on February 23, 1921, is not the basis of the cause of action here involved predicated upon the contract of November 15, 1921. *But it is*

> *undisputed that the latter contract is but a recast of the former and that the subject-matter covered by the two contracts is the same. The issue tendered by both agreements is as to the power of the city or county to contract in the same way respecting identical subject-matter.* In that sense the causes of action are identical. *Appellants make no attack upon the contract of November 15, 1921, because of the amendments thereto.* They assert no infirmity in the latter contract that is not likewise applicable, if correct, to the former. In order to overthrow the latter contract, it is necessary to upturn in toto the former. Indeed, it is axiomatic that if the former contract is legal and valid, the latter is valid also. *We have no hesitancy, therefore, in concluding that the causes of action are substantially the same and that the rule of law above announced is applicable, provided always that the parties are identical.*" (201 Cal. 509-510, 258 Pac. 390.) (Emphasis added.)

So here, the agreement in suit is but a renewal of the agreement involved in the earlier litigation between these parties, the subject matter covered is the same, the language is the same and no contention is advanced that the present agreement varies in any respect material to this case from the prior agreement.

Wolfson v. *Rubin* (Fla. 1951), 52 So. 2d 344,[15] is equally striking. In there sustaining a defense of res judicata in a contract case, the court said:

> "After that adjudication the 'identical terms of the provisions and conditions,' to quote the appellant's own brief, of the agreement involved in the first suit *were incorporated in a written contract that was executed by the parties and forms the basis of the present suit.*
>
> "As we have written, the court and the master agreed that the matter was res judicata, and we are

15. The official reports in Florida were discontinued prior to the date of this decision.

constrained to join them in that view. It is the appellant's idea that this principle cannot be invoked because the chancellor in the former suit went afield in interpreting the portion of the agreement now before us, as it was not put in issue by the pleadings. *There had been no appeal from the first decision and, even more, the appellant subsequently complied with it by signing a contract containing the exact language then adjudicated and now singled out as so uncertain as to be void.*

"*Aside from the peculiar position of acceding, without appeal, to the decree of a court construing language on one occasion and later seeking a decree of the same court to declare the same language so uncertain as to be impossible of understanding, we think the principle of res adjudicata is definitely applicable.* The interpretation of the whole contract had been sought and obtained in the first suit and, in addition, the plaintiff had prayed for general relief. Even if the matter had not been directly submitted, as we think it was, it would have fallen in the rule so often announced that a judgment on the merits in a suit between the same parties on the same cause of action by a court of competent jurisdiction operates as an estoppel, not only as to matters offered, but also '" as to every other matter which might with propriety have been litigated and determined in that action.'" Knabb v. Duner, 143 Fla. 92, 196 So. 456, 460." (52 So. 2d 345-346.) (Emphasis added.)

The "peculiar position" of the appellant there is echoed here in view of the Union's act, after the Court of Appeals' decision in the prior case, agreeing to extend the agreement with the identical provisions adjudicated in the prior case.

The same rule, of course, applies equally where separate but similar contracts are issued concurrently rather than *seriatim*, as in the foregoing cases. *Town of Beloit* v. *Morgan* (1869), 74 U. S. 619, 19 L. Ed. 205; *Tillman* v. *National City Bank* (2d Cir. 1941), 118 F. 2d 631, 633-635.

cert. den. 314 U. S. 650; *Gardner* v. *Buckbee* (N. Y. 1824), 3 Cow. 120 (repeatedly cited by this Court as an authority in this field.)

What all these decisions hold is that, whatever may be the result for other purposes and as to non-parties, as between the contracting parties themselves what is decided as to one contract will be conclusive on another contract not then in issue but identical to it. And, as pointed out in *Wolfson* v. *Rubin* (Fla. 1951), 52 So. 2d 344, this result should especially be so where the parties have renewed or re-executed a contract with the same controlling language after the prior decision has been entered.

This principle is especially applicable to collective bargaining agreements, for successive bargaining agreements are not separate, unrelated documents but a continuing statement of the whole employment relationship of the industry or plant (cf. *United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 1960, 363 U. S. 574, 578-580) and it is almost a hornbook principle that the parties to collective agreements share a degree of mutual interdependence which is seldom associated with simple contracts. Indeed, as stated in *Botany Mills* v. *Textile Workers Union*, (1958), 50 N. J. Super. 18, 141 A. 2d 107:

> "* * * While collective bargaining agreements are normally made for fixed periods of time, *they generally contemplate renewals and a subsisting contractual relationship between the employer and the union of indefinite duration.*" 50 N. J. Super. 29, 141 A. 2d 113.) (Emphasis added.)

As a matter of national labor policy, it is, therefore, of real importance that accepted adjudications and interpretations of the provisions of a collective bargaining agreement must be taken as binding on the parties until the parties

negotiate some change in them. For otherwise there can be no continuity whatsoever and the whole concept of voluntary agreement as the basis of labor relations becomes a shambles whereby the same language can mean one thing one time and the contrary the very next time either party feels like litigating the question over again.

2. The Fact That the Union Here Relies on Another Subparagraph of the Contract and on a New Grievance Does Not Provide an Escape From the Collateral Estoppel Rule.

The Union strenuously seeks to evade the collateral estoppel worked by the prior decision on the ground that the prior case involved subparagraph (3) of paragraph A of Section 10 of Article II of the contract, whereas this case presents a claim under subparagraph (1). But, plainly, the collateral estoppel doctrine does not admit of fragmenting claims by urging them to arise under different subparagraphs of the same section of the contract.

The Court of Appeals below carefully examined the briefs and pleadings in both the prior and the current cases, and pointed out that the contested issue in both cases, as stated in the Union's briefs, was whether the defendant Company had agreed to arbitrate its right to contract out work, and that in both cases the prayer for relief was exactly the same. (R. 49-50.) The grievance in the prior case was phrased in the same language as the grievance in this case. (*Independent Petroleum Workers* v. *Standard Oil Co.*, 7th Cir. 1960, 275 F. 2d 706 at 709; R. 19.) The prior decision was based on a review of the same Section 10A in its entirety. (*Ibid.*, 275 F. 2d 706 at 707-708.) The court's conclusion was that "The defendant had not contracted to refer the issue to arbitration." (*Ibid.*, 275 F. 2d 706 at 710.)

The controlling rule here is well stated in 2 *Freeman on Judgments*, 5th Ed., § 677 (1925), as follows:

> "But as to all matters expressly or necessarily adjudicated, a judgment is, of course conclusive, regardless of the difference in the causes of action. It is important to note in this connection, however, that even though the causes of action be different, if the second action involves a right, title or issue as to which the judgment in the first action is a conclusive adjudication, *the estoppel so far as that right, title or issue is concerned must likewise extend to every matter which was or might have been urged to sustain or defeat the determination actually made.*" (Emphasis added.)

Price v. *Sixth Dist. Agricultural Ass'n* (1927), 201 Cal. 502, 258 Pac. 387, discussed above at pages 39-40 hereof, is a specific application of the rule. After setting forth the matter heretofore quoted holding the collateral estoppel rule applicable, the court went on to state:

> "Appellants, however, apparently have a misconception of this rule. *They seem to contend that an issue heard and determined in a former case is binding only as to such grounds supporting or opposing said issue as were actually urged and litigated.* But an issue may not be thus split into pieces. If it has been determined in a former action, it is binding notwithstanding the parties litigant may have omitted to urge for or against it matters which, if urged, would have produced an opposite result. In other words, when an issue has been litigated all inquiry respecting the same is foreclosed, not only as to matters heard but also as to matters that could have been heard in support of or in opposition thereto." (201 Cal. 511, 258 Pac. 390-391.) (Emphasis added.)

Likewise, in *Hudson Transit Corp.* v. *Antonucci* (1948), 137 N. J. L. 764, 61 A. 2d 180, the court stated the rule:

> "The judgment of a court of competent jurisdiction on a question of law or fact, or on a question of mixed law and fact, once litigated and determined, is so long

as it stands unreversed, conclusive upon the parties and their privies, not only as to the subject of the particular action, but also as to all future litigation touching the subject matter. *This is so even though the prior and subsequent litigations involve different things*, if there be substantial identity in the subject matter of the two. *Where the right to relief in the one suit shall rest upon the same point or question which, in essence and substance, was litigated and determined in the prior suit, the parties and their privies are concluded, 'not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.'* City of Paterson v. Baker, 51 N. J. Eq. 49, 26 A. 324, 325; Hancock v. Singer Mfg. Co., 62 N. J. L. 289, 339, 41 A. 846, 42 L. R. A. 852; In re Walsh's Estate, 80 N. J. Eq. 565, 74 A. 563." (127 N. J. L. 706-707, 61 A. 2d 182.) (Emphasis added.)

See also, *Town of Beloit* v. *Morgan* (1869), 74 U. S. 619, 19 L. Ed. 205; *Smith* v. *Town of Ontario* (C. C. N. Y. 1880), 4 Fed. 386; *National Labor Relations Board* v. *Brown & Root* (8th Cir. 1953), 203 F. 2d 139, 146; and *Zdanok* v. *Glidden Co.* (2d Cir. 1964), 327 F. 2d 944, 952-953, cert. den. 377 U. S. 934, quoted above at pages 35-36 hereof.

In short the collateral estoppel rule carries with it the same burdens with respect to issues litigated as the res judicata rule carries with respect to the entire cause of action. A party cannot fragment his arguments and points relative to an issue and thereby obtain the right of relitigation which the policy of the rule forbids. 50 C. J. S., Judgments, § 712(c). This is precisely what the court below held (R. 50) and is what the authorities require.

Nor can the estoppel be evaded because separate grievances are involved. The Union tries to liken this case to one involving "two negligence actions arising out of different automobile accidents involving the same parties"

(Brief for Petitioner, p. 24) in an attempt to turn attention from the fact that this is a contract case and involves not an adjudication as to an earlier tort, but rather a prior judicial interpretation of the same contract provisions. The rule here is:

> "* * * If the existence, validity or *construction of a contract*, lease, conveyance or other obligation has been adjudicated in one action it is res judicata when it comes again in issue in another action between the same parties, though the immediate subject matter of the two actions be different." (2 *Freeman of Judgments*, 5th Ed., § 672, p. 1418.) (Emphasis added.)

So, when a contract has been construed as to whether certain receipts are subject to a covenant for payment, that determination is binding in a later action between the parties involving later receipts but of the same class as those involved in the prior case. *Tioga R. R. Co.* v. *Bloss. and Corn. R. R. Co.* (1874), 87 U. S. 137, 22 L. Ed. 331, 334. So also, in *N. L. R. B.* v. *Brown & Root* (8th Cir. 1953), 203 F. 2d 139, a determination in a prior case that two companies were separate entities was binding in a later case arising under a later, but similar, claimed unfair labor practice. The same reasoning is implicit in *Fishgold* v. *Sullican Drydock & Repair Corp.* (1946), 328 U. S. 275. In there holding that a union had an appealable interest in an action brought by an employee for declaratory relief as to his rights under the Selective Training and Service Act of 1940, this Court noted that the union and the employer were parties and their collective bargaining agreement was in issue. This Court then pointed out:

> "* * * But, however the result might be rationalized, a decision for or against petitioner necessarily *involved a construction of the collective bargaining agreement.*

> *That issue was adjudicated, with the union as a party.* Hence, if the union had thereafter instituted a separate suit for an interpretation of the agreement, *it would be met with the plea of res judicata. And that plea would be sustained*, for the prior decision was on the precise point which the union sought to relitigate and was adverse to the union. And both parties to the agreement—the union and the corporation—were parties to the prior suit." (328 U. S. 282.) (Emphasis added.)

Any later case would, of course, involve different employees and a different grievance, but as this Court noted, the adjudicated construction of the agreement would still be "res judicata" of the meaning of the agreement in the subsequent action.

So here, all the Union has done is to shift its argument for arbitrability under the contract and apply it to another grievance of exactly the same language, character and subject matter as that involved in the prior case. Under the authorities, the prior interpretation and construction that such a grievance was not within the arbitration provisions is determinative of the issue and cannot now be relitigated all over again on the basis here urged by the Union.

3. The Intervention of the Steelworkers Trilogy Does Not Make the Collateral Estoppel Rule Inapplicable.

Finally, the Union urges that the decisions of this Court in the Steelworkers Trilogy after the decision in the prior case make the prior decision obsolete and the collateral estoppel rule is thereby evaded. Here again, it must be emphasized that the effect on the collateral estoppel rule of intervening judicial decisions indicative of a change or

development in the controlling legal principles is one thing where the Government is a party and the legal issues are matters of important public law, but quite another in a simple contract action involving only private rights under the contract. In the former, even "legal modulations by this Court" (*Commissioner* v. *Sunnen*, 333 U. S. 591, 600) require reconsideration, and in the latter cases a decisive change in the law is required. *Dr. Salsbury's Laboratories* v. *I. D. Russell Co.* (8th Cir. 1954), 212 F. 2d 414, 416, cert. den. 348 U. S. 837. Cf. 2 *Freeman on Judgments*, 5th Ed., § 713 (1925).

As has been heretofore noted (pp. 34-35, *supra*), the interpretation of a contract is always a difficult task of determining the meaning of the words in the light of all relevant circumstances and, indeed, the question of the interpretation of a contract is a question of fact, not a question of law. 3 *Corbin on Contracts*, § 554 (1960). As such, it constitutes the type of issue as to which the collateral estoppel rule is peculiarly applicable.

Regardless of whether the issue may be characterized as a pure fact issue, it is plain that in cases such as this, the collateral estoppel rule cannot be sidestepped on the grounds advanced by the Petitioner here.

The Steelworkers Trilogy does not, of course, attempt to make any change in the basic rules that the arbitrability of labor grievances must be measured by the voluntary agreement of the parties, and that it is a matter for the courts to determine whether the agreement made embraces a grievance of the kind involved. These were the rules applied by the court below in the original case. *Independent Petroleum Workers* v. *Standard Oil Co.* (7th Cir. 1960), 275 F. 2d 706, 707, 709, 710. While the opinion in that case did

contain one citation to the reversed lower court opinion in *Warrior & Gulf* (*Ibid.*, 275 F. 2d at 709), the decision was not based upon that as an authority, but took into account the fully developed record of stipulated facts in interpreting the agreement, as must be done in interpreting any contract. 3 *Corbin on Contracts*, § 535 (1960), quoted above at pages 34-35 hereof. The claim now made that the lower court's prior decision "relied heavily" on the reversed lower court decision in *Warrior & Gulf* (Petitioner's brief, p. 6) is exaggerated. The court cited it once for comparison. It neither quoted nor discussed it. Its decision did not rest upon it. It is notable that the Union did not think, at that time, that the decision was so founded, since it made no effort to apply to this Court for a writ of certiorari, even though the court of appeals' decision in *Warrior & Gulf* was then pending before this Court, certiorari having been granted in it some several months before.

Likewise, the Trilogy decisions made no attempt to innovate some new rule of substantive law to govern collective bargaining contracts. Indeed, these decisions marked no decisive change in the law, but rather constituted examples of the orderly development of legal principles in the way common in our jurisprudence. Unless the collateral estoppel rule is to be denuded of all significance, changes of this character cannot be a basis for avoiding the rule, for the law is constantly growing and developing and is never absolutely static.

Plainly, the collateral estoppel rule does not permit that every adjudication relied on may be re-examined to determine whether it would now be decided the same way by an upper court. Indeed, if review by this Court of the prior decision had been desired, it could have been sought

during the time the Trilogy cases were pending before this Court. The rule controlling this case is *United States* v. *Moser* (1924), 266 U. S. 236. That was an action by a retired naval officer to recover retirement pay, and the fighting issue was whether his service at the Naval Academy constituted service during the Civil War. In prior litigation before the Court of Claims on prior installments of salary, the same issue had been litigated and determined in the officer's favor. After the first two suits, the Court of Claims reached a contrary result in the case of another claimant on the ground of another statute called to the court's attention for the first time. The final action arose thereafter and involved later pay periods. This Court refused even to consider the effect of the newly found statute on the ground of the collateral estoppel rule and said on this point:

> "The suits here are upon different demands; and the point at issue is to be determined by applying the second branch of the rule. The question expressly and definitely presented in this suit is the same as that definitely and actually litigated and adjudged in favor of the claimant in the three preceding suits, viz.: whether he occupied the status of an officer who had served during the civil war.
>
> "The contention of the Government seems to be that the doctrine of *res judicata* does not apply to questions of law; and, in a sense, that is true. *It does not apply to unmixed questions of law.* Where, for example, a court in deciding a case has enunciated a rule of law, the parties in a subsequent action upon a different demand are not estopped from insisting that the law is otherwise, merely because the parties are the same in both cases. *But a fact, question or right distinctly adjudged in the original action cannot be disputed in a subsequent action, even though the determination was reached upon an erroneous view or by*

an erroneous application of the law. That would be to affirm the principle in respect of the thing adjudged but, at the same time, deny it all efficacy by sustaining a challenge to the grounds upon which the judgment was based." (266 U. S. 242.) (Emphasis added.)

This specific language has been since approved in *Partmar Corp.* v. *Paramount Corp.* (1954), 347 U. S. 89, 103, and the principle has been recognized in *Kennedy* v. *Mendoza-Martinez* (1963), 372 U. S. 144, 157. The claim Petitioner here advances comes squarely within this rule, and it, accordingly, falls.

CONCLUSION.

The Court of Appeals followed exactly the principles laid down by this Court. It examined the contract to see whether the Company had promised to arbitrate this grievance. It made that examination in the way prescribed by this Court. It found, correctly, that the Company did not so promise.

Essentially the Union contends that because this Court found a promise to arbitrate in the *American* and *Warrior* contracts, the Court of Appeals erred in not finding such a promise in this contract. The Union ignores the fact that the contracts do not resemble each other. The principle laid down by this Court is that the lower court must interpret the particular contract, not that it find in every case for the Union.

The meaning which the Court found the arbitration provisions to have, was the same meaning which it was adjudicated to have in a prior action between the same parties. After that adjudication they bound themselves again to the same language. If they intend a different meaning, they must bargain for and agree to different language. If that is not the rule between unions and employers, litiga-

tion and relitigation will be encouraged instead of bargaining, and a vital national labor policy will be frustrated.

The judgment of the Court below should be affirmed.

Respectfully submitted,

RICHARD P. TINKHAM,
DANIEL F. KELLY,
ALLEN W. TEAGLE,
708 Calumet Building,
Hammond, Indiana 46320,

DONALD L. HASTINGS,
910 South Michigan Avenue,
Chicago, Illinois 60680,

FREDERIC D. ANDERSON,
JERRY P. BELKNAP,
JAMES F. HILLIS,
1313 Merchants Bank Building,
Indianapolis, Indiana 46204,
Attorneys for Respondent.

TINKHAM, BECKMAN, KELLY AND SINGLETON,
Hammond, Indiana 46320,

BARNES, HICKAM, PANTZER & BOYD,
Indianapolis, Indiana 46204,
Of Counsel.